9-27-2011

Tapadeera, LLC v. Knowlton Respondent's Brief Dckt. 38498

IN THE SUPREME COURT OF THE STATE OF IDAHO

TAPADEERA, LLC and CARY HAMILTON dba C&J CONSTRUCTION Plaintiffs/Respondents, v. JAY F. AND THERESA KNOWLTON, Defendants/Appellants.	)	Supreme Court Case #38498-2011 Minidoka County Case #2008-607

RESPONDENT'S BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Minidoka

HONORABLE JONATHAN BRODY, District Judge, presiding.

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STATEMENT OF THE CASE

Plaintiffs, Tapadeera, LLC and Cary Hamilton, filed suit alleging defendants owed Tapadeera $23,421.01 based on plaintiffs' claim that defendants were in breach of a real property sale contract.(R.p.1) At the time of trial the parties entered into a settlement agreement. Plaintiff later sought damages alleging that defendants had breached the settlement agreement.(R.p.49)

A) COURSE OF PROCEEDINGS

Plaintiffs filed suit on August 13, 2008.(R.p.1) In the complaint there were several causes of action raised. Defendants filed an answer (R.p.19) and raised, as to some of plaintiffs' causes of action, a statute of limitations defense. In response to this defense, on January 12, 2009, plaintiff, by filing an amended complaint, voluntarily dropped the challenged causes of action. (R.p.25) One of the dropped causes of action was based on a check that had been written by the Knowltons to Cary Hamilton. Cary Hamilton was a member of Tapadeera, LLC. Cary Hamilton was named as a plaintiff only because the check, on which one of the original causes of action had been based, had been made payable to C & J Construction which was a dba of Cary Hamilton. Tapadeera was the party in interest on the other causes of action. When the Amended Complaint was filed

plaintiffs overlooked removing Cary Hamilton's name from the pleadings.

Trial was set for the 9th day of September, 2009.(Tr.p.4) However, prior to the court taking any testimony, the parties reached a settlement and so advised the court.(Tr.p.4) The settlement terms were then placed on the record.(Tr.pp.4-9)

After this settlement was reached the settlement fell apart and plaintiffs filed a Motion for Judgment of Foreclosure. Plaintiffs claimed that defendants had breached the settlement agreement and that because of this breach the plaintiffs should be allowed to foreclose. A hearing was held. (Tr.pp.11-38) The district court denied this motion and indicated that the pleadings needed to be amended to add a new cause of action based on the plaintiff's allegations that defendants had breached the settlement agreement. (Tr.pp.35-37)

In response to the court's directive plaintiffs' filed their Second Amended Complaint on April 5, 2010. (R.p.49) An Amended Answer was filed on April 21, 2010. (R.p.65) When plaintiffs filed their Second Amended Complaint Cary Hamilton was dropped as a plaintiff.

Plaintiff then filed a Motion for Summary Judgment which was supported by various affidavits. (See Stoker Stipulation to Augment) Defendants filed a counter affidavit.(See Jensen

Stipulation to Augment) A hearing was held. (Tr.pp.47-76) The court granted plaintiff's motion and judgment was entered for plaintiff. (R.p.89) Defendants then filed a Motion to Reconsider which motion was heard by the court on December 8, 2010. (Tr.pp.78-99) The court denied defendants' Motion to Reconsider. (R.p.94)

Plaintiff filed a Memorandum of Costs with a supporting affidavit.(R.pp.78-81) After the court denied defendants' Motion for Reconsideration an amended Memorandum of Costs and an Amended Affidavit were filed. (R.pp.109-112) Defendants filed an objection to plaintiff's request for costs and fees. (R.p.92) The court awarded costs but denied the request for attorney fees.(R.p.124)

On January 19, 2011, defendants filed a Notice of Appeal.(R.p.122) Based on the court's denial of attorney fees plaintiff filed a Cross Appeal. (R.p.137)

Following the filing of defendants' Notice of Appeal defendants filed an objection to the court heading. This objection was based on the heading only showing Tapadeera as a plaintiff. Defendants wanted to have Cary Hamilton added back in as a plaintiff. A hearing was held. On April 27, 2011 the court entered an order including Cary Hamilton as a plaintiff.(R.p.147)

The parties have filed two stipulations to augment the

record. The first augments the record with the Paul Aston deposition and with the Knowlton affidavit that was filed in opposition to the Motion for Summary Judgment. The second stipulation provides four affidavits submitted by plaintiff in support of plaintiff's Motion for Summary Judgment.

STATEMENT OF FACTS

Tapadeera owned an 8 acre parcel of land in Minidoka County. Tapadeera originally sold the 8 acres to a family by the name of Holt. The Holts wanted to build a house and they arranged financing for the purchase. However, the bank only wanted to secure its loan against two of the acres. Consequently, a legal description was generated for the two acres and the bank financed the house, taking security in the two acres. This resulted in two legal descriptions filed of record, one for the two acre parcel and one for the six acre parcel.(Aston, p.6)

After the transaction had taken place the Holts got into financial difficulty which resulted in the bank foreclosing on the two acre parcel. Plaintiff ended up getting the 6 acres back because of Holts' inability to pay.

After the two acres went back to the bank and after the 6 acres was returned to plaintiff's ownership the defendants contacted plaintiff's agent, Cary Hamilton, and indicated they were interested in buying the 6 acre parcel. The defendants also

became aware of the availability of the two acre section on which Holts had built their home. The defendants purchased the two acres from the bank and entered into an agreement with plaintiff to purchase the 6 acres. Defendants started making payments and later took possession of the 6 acre parcel.(R.p.1)

After a few payments had been made Mr. Knowlton contacted Cary Hamilton and requested a payoff. The amount was identified and Mr. Knowlton wrote a check payable to C&J Construction for $23,421.00. A deed was delivered to Mr. Knowlton and then recorded. At or about the time the deed was recorded Mr. Knowlton stopped payment on his check. Upon contact being made with Mr. Knowlton he refused to make the payment for the check and refused to return the property. (Plaintiff's Complaint, R. p.1)

Nothing happened for about 4 years. After 4 years the plaintiff filed suit seeking to foreclose against the property and/or to collect the $23,421.00 that was owed.

The case was set for trial but before the trial began the parties negotiated a settlement. The terms of the settlement agreement were recited in open court and placed on the record. (Tr.pp.4-9). The essentials of the settlement were that plaintiff would apply to the county to have the 8 acres subdivided, that defendants would cooperate in getting the 8

acres subdivided, and that once the subdivision was granted defendants would pay plaintiff $23,421.01.

Plaintiff prepared an application to amend the subdivision plat, obtained the Knowlton's signature on the application, paid the necessary fees and costs and then submitted the application to the county for the eight acres to be subdivided. (Aston, p.15-16)

A hearing was scheduled before the planning and zoning committee (P&Z) to get preliminary approval to subdivide the 8 acres into two lots. For some reason the county failed to send notice of the hearing date to the Knowltons.(Aston, pp.20-22) Cary Hamilton attended the P&Z hearing and presented the request. P&Z gave initial approval to the subdivision and forwarded the application to the County Commissioners for the final approval. (Aston, p.23) Before any further steps could be taken to deal with the application Mr. Knowlton sent a letter to the county withdrawing the application. (Jeff Stoker Affidavit #1)(Aston, pp.24-25) Since Mr. Knowlton was the title owner of the full 8 acre parcel the county would take no further steps, nor would they consider the application, without Mr. Knowlton's agreement. (Aston, pp.25-28) The county sent a letter to Cary Hamilton notifying plaintiff of the county's inability to take any further action due to Mr. Knowlton's withdrawal of the application. (Jeff

Stoker Affidavit #3)(Aston, pp.27-28)

Plaintiff, through his attorney, sent two letters to defendants inviting them to reconsider their position.(Stoker Affidavit #3) Defendants did not respond except to confirm they were not going to allow the application to go forward. (Jeff Stoker Affidavit #3)

ISSUES PRESENTED

1. Did the trial court err in granting plaintiff's Motion for Summary Judgment?

2. Did the trial court err in denying plaintiff's request for an award of attorney fees?

3. Did the trial court err in requiring that the heading be amended to add Cary Hamilton as a plaintiff?

ARGUMENT

From a review of defendants' brief it appears defendants are making four arguments. The first is that there was a question of fact which arose because:

> Hamilton had been contacted with regard to the placement of the easements and had failed to take into account the Knowlton's concerns. (Ds' brief, p.10)

This argument is, in essence, an argument that plaintiff breached its obligation, as per the settlement agreement, which justified defendants' breach of the agreement.

Defendants' second argument is that because defendants did

not receive notice of the P&Z meeting that they were justified in unilaterally preventing plaintiff from going forward with the subdivision application.(Ds' brief, p.7)

Defendants' third argument is that plaintiff breached the covenant of good faith and fair dealing and that this justified defendants "pulling the plug" on the subdivision application.(Ds' brief, p.13)

Defendants raise, as their fourth challenge, the argument that the underlying sale agreement was "illegal" and that for this reason the court should invalidate the settlement agreement. (Ds' brief, pp.13-15)

Defendants do not argue that the trial court was in error when it ruled that defendants breached the settlement agreement. It appears defendants have conceded they breached the agreement by their interference with plaintiff's ability to get the subject property subdivided and defendants' arguments are limited to why they feel they were justified in so breaching the settlement agreement. Before addressing defendants' four arguments plaintiff will address the validity of the settlement agreement and the reasons why defendants were in breach of this agreement.

I. THE SETTLEMENT AGREEMENT WAS A VALID CONTRACT AND DEFENDANTS BREACHED THIS AGREEMENT

Some general principles regarding settlement agreements, which are entered into with the purpose of compromising and

settling legal disputes, are set forth in *Lawrence v. Hutchison*, 146 Idaho 892, 204 P.3d 532(App. 2009). The court stated the following in regard to settlement agreements:

> Stipulations for the settlement of litigation are regarded with favor by the courts and will be enforced unless good cause to the contrary is shown. (Citations omitted) Generally, oral settlements do not have to be reduced to writing to be enforceable. (Citations omitted) Oral stipulations are binding when acted upon or entered on the court records. 146 Ida @ 898
>
> And also:
>
> An agreement entered into in good faith in order to settle adverse claims is binding upon the parties, and absent a showing of fraud, duress or undue influence, is enforceable either at law or in equity.(Citations omitted)
>
> Oral settlement agreements must comply with the requirements for contracts.(Citations omitted) Such a contract stands on the same footing as any other contract and is governed by the same rules that are applicable to contracts generally. 146 Ida. @898

The essential elements of the settlement agreement, entered into by the parties before Judge Crabtree, (Tr. pp.4-9) are as follows:

1. Mr. Hamilton would prepare the subdivision application and secure the documentation required by the county, including the survey, to submit to Minidoka County.

It is uncontested that Mr. Hamilton complied with these requirements and that the application, with supporting documents, was prepared and submitted to the County.

2. The Knowltons, or either of them, was required to sign

the application.

Undisputed: Defendants signed the application.

3. Mr. Hamilton was required to submit the application to Minidoka County and to go forward with the proceedings before the county agencies.

Undisputed: Plaintiff's Mr. Hamilton did submit all paperwork to Minidoka county and did appear at the P&Z hearing at which time P&Z recommended the approval of the subdivision, subject to conditions.

4. The Knowltons were required to be "supportive and to assist" Mr. Hamilton in getting the subdivision application filed and in getting the subdivision approved. Specifically, the Knowltons were to "be supportive" and to "cooperate as necessary to get the subdivision approved."(Tr.p.5, l.4-10)

A written stipulation was contemplated at the time the settlement was placed on the record but no stipulation was ever filed.

Mr. Hamilton did everything he was supposed to do. P&Z approved the application but, due to an error by the county, no notice of the P&Z meeting was ever sent to defendants. Mr. Hamilton had no knowledge that no notice was sent to defendants.(Aston, p.21-22) Following the approval by P&Z, Mr. Knowlton sent his February 22, 2010 letter to Minidoka County.

This letter, by its terms, absolutely negated the ability of Mr. Hamilton to go forward with the application for approval of the subdivision.(Stoker Affidavit #3)

In reviewing the terms of the settlement agreement,(Tr. pp. 4-9) it is clear there was a settlement agreement entered into, that there was a meeting of the minds, with consideration. Each party had certain contractual obligations based on the settlement. As of the time Mr. Knowlton sent his letter to Minidoka County Mr. Hamilton had complied with all of his contractual obligations. Mr. Hamilton's ability to complete his contractual obligations was dependent on Mr. Knowlton's cooperation and assistance. Mr. Knowlton, by sending the letter to Minidoka County withdrawing the application, not only failed to cooperate but negated plaintiff's ability to take any further action to get the subdivision approved.

The lower court determined, as a matter of law, that the settlement agreement between the parties constituted a contract. Plaintiff submits that there should be no question that an agreement was entered into by the parties and defendants, in their brief, have not made any arguments or challenges to the validity of the settlement agreement.

The doctrine of prevention of performance is applicable to this case and, because of defendants' unilateral action in

terminating plaintiff's ability to go forward with Minidoka County, the plaintiff was excused from obtaining, from the county, final approval of the proposed subdivision.

In *Ferguson v. City of Orofino*, 131 Ida. 190, 193, 953 P.2d 630(App 1998) the court discussed the pertinent doctrine as follows:

> The doctrine of prevention of performance excuses a party from fulfilling his contractual obligations when the party to whom the obligation is owed unlawfully prevents the first party from tendering performance. *Sullivan v. Bullock*, 124 Idaho 738, 741-42, 864 P.2d 184, 187-188 (Ct. App.1993). See also John D. Calamari & Joseph M. Perillo, *The Law of Contracts* # 11-28 (3d ed. 1987); Walter H.E. Jaeger, Williston on *Contracts* #1316 (3d ed.1968). The party whose performance has been prevented may be entitled to damages for the benefit of the bargain that would have been earned through performance. *Sullivan*, 124 Idaho at 743-744, 864 P.2d at 189-90; *Calamari*, *supra*.

In *Sullivan, supra*, the following is stated:

> A previously stated, a party who is prevented from performing by the party for whom the work is being done, may treat the contract as breached and may recover damages sustained. 124 Idaho @ 738

No appellate issue has been raised by defendants concerning the amount of damages, to which plaintiff was entitled, or the trial court's decision giving defendants 30 days to pay the $23,421.01 or to have the foreclosure go forward. (R.pp.89-90)

Plaintiff will now address defendants' four arguments. These are the same arguments defendants raised in the lower court. Plaintiff submits that all four arguments are frivolous,

unreasonable and without foundation. If the court agrees then such a determination will have bearing on the attorney fee issues hereinafter discussed.

II. DEFENDANTS' EASEMENT ARGUMENTS ARE NOT MERITORIOUS

Paul Aston's testimony shows why defendant's easement arguments are unsound. The following is a partial summary of the information provided by Mr. Aston's testimony:

1. The Knowltons could have built the house they wanted to build on the 6 acre portion of the land they owned as long as they continued to have ownership of the full 8 acres. (Aston, pp. 14-15, 32)

2. An application for an amended subdivision was submitted by Cary Hamilton as per the settlement agreement.(Aston,p.15)

3. A plat, with easements, was also submitted.(Aston, p.16)

4. It was required that the plat show easements for road access and for water supply to both parcels.(Aston, pp.16-18)

5. The County had no concerns about where these easements were located so long as provision was made for road and water access. (Aston, p.18-19)

6. Knowltons did not get notice of the P&Z hearing because the County computer did not print out a label. (Aston, pp.21-22)

7. The P&Z commission approved the proposed amended subdivision with the condition that the irrigation easements

would have to be acceptable to the irrigation district and that the plat would have to comply with the county subdivision ordinance.(Aston, p.24)

8. Following the P&Z approval the next step would have been for plaintiff to obtain the approval of the irrigation district and to then submit the matter at a hearing before the county commissioners for their review. (Aston, p.24)

9. This process was stopped by the Knowlton letter of February 22nd, 2010.(Aston, pp.24-28)

10. If the Knowltons had withdrawn their letter the County would have allowed the procedure to continue so long as the final approval was obtained before February 18, 2011. If defendants had withdrawn their letter the parties would have still had one year to complete the process. (Aston, p.28)

11. The lack of notice to the Knowltons could have been corrected by simply re-noticing a second meeting before P&Z. (Aston, p. 26)

12. The Knowltons' gripe about the easements was of no significance because the Knowltons could have made any changes they wanted with the easements before the matter was re-noticed before P&Z. (Aston, p.27)

13. The Knowltons could also have dedicated additional easements for the water delivery and/or the road access without

changing the easements identified on the subdivision plat. (Aston, pp.36-37, 39-40)

14. If the letter had been withdrawn the whole process could have been completed in 2½ to 3 months. (Aston, p.29)

15. Mr. Aston did not anticipate that there would have been any problem getting the subdivision approved. (Aston, p.30-31)

16. The 8 acre parcel did have two legal descriptions, one for two acres and one for six, filed of record. This had been done for financing purposes and was not illegal.(Aston, pp.33-34)

Cary Hamilton had a plat prepared for the proposed subdivision that would have allowed defendants' 8 acre parcel to be divided into two lots, a 2 acre lot and a 6 acre lot. In order to complete the subdivision, to the satisfaction of Minidoka County, it was necessary that there be easements across the two parcels in order to make sure each lot could be accessed by a roadway and to make sure that water could be distributed from the canal source to both parcels. Easements were provided for on the plat which meant that those easements would have been dedicated easements if the subdivision had been approved.

The fact that easements were identified on the plat, whether for the roadway or for the water supply, did not limit defendants in imposing such other easements on the property as they saw fit. The only County requirement was that there be provision for road

and water access. The county didn't care if the Knowltons made provision for any other easement they saw fit. Consequently, the Knowltons had the unlimited right to put a roadway easement any place they wanted and they could also have placed a water easement any place they wanted. This was because they were the sole owners of the 8 acres which gave them the right, and ability, to make these decisions and changes regardless of the subdivision plat.

Defendants argue that because they had some concerns about the location of the easements that they were justified in sending their letter to the County that stopped the subdivision process. However, as clearly demonstrated by Paul Aston's testimony, to which there is no challenge in the record, defendants' easement concerns could have been dealt with in one of two ways. The first was that prior to a second hearing before P&Z the easements could have been changed to suit the Knowltons. The second was that the easements identified on the initial plat could have been left on the proposed plat without any change and the Knowltons could have created other easements later on without going back through the subdivision process. Defendants argument that the trial court was speculating, when it determined that the Knowltons' complaints could have been addressed with little, or no, difficulty if they had simply cooperated, is very weak. The

court reached the correct conclusion on this issue and defendants' arguments that the judge was "speculating" has no merit because it was defendants' actions that denied plaintiff the right to go forward with the process in order to find out if the subdivision would have ultimately been approved.

The court is referred to the March 5, 2010 Stoker letter to Mr. Jensen advising that the Knowltons' "gripes" could be addressed and dealt with and that the plaintiffs were willing to meet to resolve the issues. (Stoker Affidavit #3) No meeting was ever arranged or requested by defendants. For all of these reasons there is no merit whatsoever to defendants' argument in regard to the easements.

The defendants second argument, that they didn't receive notice of the P&Z meeting, is also without merit because, as heretofore indicated, the P&Z meeting could easily have been re-noticed which would have allowed Knowltons to participate in the re-noticed hearing.

III. THE COVENANT OF GOOD FAITH AND FAIR DEALING SHOULD NOT BE APPLIED TO THIS CASE.

It appears that defendants' covenant of good faith argument is a rehash of the easement and the notice arguments. Defendants argue that Cary Hamilton did something wrong or that he acted in bad faith but defendants fail to identify anything he did wrong although defendants again discuss the easement situation and the

notice issue.

Returning again to the easement argument, this argument is not meritorious for the reasons previously set forth. Another reason why this argument is not meritorious is that the Knowltons signed the application that was submitted to the County. They had the opportunity, before signing the application, if they saw the need, to wait to sign until any issues they had were resolved. By signing the application defendants, it is submitted, waived any arguments they had to the placement of any easements.

As indicated in Paul Aston's deposition, the lack of notice to the Knowltons was in major part because the county's computer did not print a label to send notice to the Knowltons. However, even if no notice was received this problem could easily have been corrected by just re-noticing the P&Z meeting at which time Knowltons could have appeared. The other problem with defendants' argument, in this regard, is that it was not Cary Hamilton's fault that the notice did not get to defendants-it was the County's.

The other problem with defendants' argument is that even if they didn't receive any notice of the P&Z meeting, their presence, or absence, at the P&Z meeting wasn't of any significance unless they wanted to complain and object to the P&Z

approving the application. The objective was to get the application approved but the more one listens to defendants' arguments the more one becomes convinced that defendants never wanted the application approved because they did not want to pay the money. The application was approved. That should have been the goal for both parties and the defendants should have been glad that step one of the process had been completed successfully.

As indicated by Paul Aston, the P&Z approval was subject to the condition that the irrigation company, and the County as to the easements, be satisfied. At the anticipated hearing before the County Commissioners the easement issue could have been dealt with and the easements moved and the Knowltons would have been given the opportunity to attend the hearing.

There is a significant likelihood that the Knowltons intended to do whatever it took to sabotage the process had they attended the P&Z hearing. If the approval was obtained they had to pay the money which, it appears, they did not want to do.

Another problem with defendants' "covenant of good faith and fair dealing" argument is that defendants are raising this as a defense but they did not raise this as a defense in their answer. (R.p.19,65) Defendants first presented this as a defense at the time of the summary judgment motion.

An analysis of the principles of the covenant of good faith and fair dealing demonstrates that if there was a breach of the covenant of good faith and fair dealing that it was the defendants that breached this implied covenant.

In *Bushi v. Sage Health Care, PLLC*, 146 Idaho 764, 768, 203 P.3d 694(2009) the general rules for the application of this doctrine are set forth. The following is a synopsis of these rules:

1. The covenant only arises "regarding terms agreed to by the parties".

2. No covenant will be implied that is contrary to the terms of the contract.

3. A violation only occurs when "either party .... violates, nullifies or significantly impairs any benefit of the ... contract...." *Idaho First Natl Bank v. Bliss Valley Foods*, 121 Idaho at 288, 824 P.2d at 863 (citations omitted)

4. A person claiming a breach of this covenant must identify a specific term of the agreement that the other party violated, nullified or significantly impaired.

5. The contract terms are not overridden by the covenant of good faith and fair dealing.

The terms of the settlement agreement were that plaintiff would file an application to get the defendants' 8 acres

subdivided, that plaintiff would file the plat and otherwise take care of the procedural steps necessary to effectuate the subdividing of the property. The defendants were to cooperate with the process and, upon the approval of the amended subdivision, pay plaintiff $23,421.01. These were basically all of the terms. There was no term of the settlement agreement that discussed any easements or the location of any easements.

Defendants' brief states that because the "placement of the easements and the giving of notice were important factors to the Knowltons" that somehow the Knowltons' displeasure with these issues constituted, on the part of plaintiff, a breach of the covenant of good faith and fair dealing.

Defendants do not point out any term of the agreement that plaintiff is supposed to have violated, nullified or significantly impaired. As previously set forth in this brief, even if the easement issue needed to be addressed there was plenty of leeway for this to be done without the Knowltons sending the letter to the County that completely terminated the application process.

The end result of this analysis is that the Knowltons, other than signing the application, did not cooperate in any way with the process of getting the subdivision amended. On the contrary, the Knowltons did everything they could to stop the process. If

either party breached the covenant of good faith and fair dealing it was the defendants because they, in bad faith, frustrated plaintiff's ability to accomplish the primary objective of the settlement agreement, i.e. to obtain Minidoka County's approval of the subdivision of the 8 acres.

Defendants go on to argue that whether or not the County would have approved the subdivision "is speculative" on the part of the trial court. The problem with this argument is that defendants' conduct, in sending the letter to the County and in failing to withdraw the letter after being given the opportunity to do so, resulted in plaintiff being denied the opportunity to even try to get the subdivision approved. Again, as stated by Mr. Aston in his deposition, he had every expectation that the County would have approved plaintiff's application to amend the subdivision plat. (Aston, p.30-31)

IV. THE ORIGINAL SALE AGREEMENT WAS NOT VOID BASED ON A VIOLATION OF AN ORDINANCE

Defendant argues that the original real property sale agreement, that was entered into between the parties, was a contract that was void and against public policy. This argument is based on defendants' position that there was a provision in the Minidoka County Ordinance that made it a misdemeanor for any person to violate a provision of the subdivision/zoning ordinance.

Even if this public policy defense had any merit to start with, which it did not, any such defense was made moot when the parties entered into their settlement agreement. In addressing defendants' arguments in this regard plaintiff will first demonstrate that this defense, from the beginning, was without foundation in law or in fact.

The parties entered into a real estate purchase contract wherein the plaintiff would sell to the defendants a six acre parcel of real property.(R.1) Plaintiff's obligations, that constituted the consideration plaintiff was giving in the contractual situation, was to transfer the ownership of a six acre parcel to defendants.

Defendants' argument is that the creation of two legal descriptions involving the 8 acres, which took place before defendants had any involvement whatsoever with the 8 acres, constituted the creation of a subdivision that did not have the blessing of the County Commissioners and that, therefore, there was an "illegal" subdivision.

In this regard, defendants make an inaccurate statement in their brief, (Ds' B.p.15) when the following is stated:

> There is no dispute in the factual record that the subdivision performed by Hamilton was illegal and in violation of the Minidoka County ordinance."

This statement is totally misleading and incorrect. When the

so called "illegal subdivision" was created it was created for financing reasons. The Holts, who were the original buyers of the property from plaintiff, wanted to build a house and to do so they had to have bank financing. The bank only wanted security in a two acre parcel and so a two acre parcel was created in order to facilitate the financing of the home construction. As noted by Paul Aston, the statute prohibits land divisions for "developmental purposes", it does not prohibit land divisions for financing purposes.(Aston Depo, pp.33-34)

The Minidoka Ordinance did not prohibit the sale or the transfer of ownership of real property. The County Ordinance only prevented a person from getting a building permit to build on the property if the property did not comply with the zoning and subdivision ordinance.

In *Farrell v. Whiteman*, 146 Idaho 604, 609, 200 P.3d 1153 (2008), there is fairly extensive discussion about contracts that are considered "illegal contracts". As part of this discussion the following is stated:

> Generally, when the consideration for a contract explicitly violates a statute, the contract is illegal and unenforceable. *Barry v. Pac. W. Constr. Inc.*, 140 Idaho 827, 832, 103 P.3d 440, 445(2004). In most cases the court will leave the parties to an illegal contract as it finds them.

And also:

> ....(O)nly those contracts which involve consideration that is expressly prohibited by the relevant prohibitory statute

> are void. See *Miller v. Haller*, 129 Idaho 345, 352, 924 P.2d 607, 614 (1996).....
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> Such statutes must be narrowly construed and only those contracts violating express provisions thereof will be deemed illegal. Id.

The action of selling and/or transferring real property did not violate the Minidoka Ordinance. This was the consideration given by plaintiff in the transaction. There was nothing illegal about this action. Defendants are basically ignoring all legal principles about what makes a contract void because of statutory violation. This is a case of "don't confuse me with the facts because my mind is already made up". The Minidoka Ordinance had absolutely no provisions that were violated when plaintiff agreed to sell 6 acres to defendants.

Defendant cites *Kunz v. Lobo Lodge, Inc.*, 133 Idaho 608, 990 P.2d 1219(App.1999) as support for their "illegality" argument. However, this case is distinguishable. In *Kunz* the court determined that a lease that provided for the placement of illegal billboards could not be enforced. The reason for this was that the consideration to be given by one party, the placement of the billboards, was in direct violation of an ordinance. In the present case the sale of real property was not in violation of any ordinance and, in fact, no part of the consideration given by either party, was in violation of the Minidoka ordinance.

To the extent any argument even exists that there was a violation of the Minidoka ordinance, this argument is nullified by the fact that Knowltons ultimately purchased the 2 acre and the 6 acre parcels putting all the property back in the ownership of one person.

The next reason defendants' argument, on this issue, fails is because of the settlement agreement.

There is clearly no "illegality" defense to the settlement agreement. Defendants are making no such claim. Consequently, the only argument is as to the original sale agreement. The issue then arises as to what effect the settlement agreement had, or has, on any defenses defendants may have had to the original contract.

Some principles from Idaho case law that should be dispositive of defendants' arguments on this issue are:

1. An agreement entered into in good faith in order to settle adverse claims is binding upon the parties and absent a showing of fraud, duress or undue influence, is enforceable. *Young Elec. Sign Co. v. State*, 135 Idaho 804, 25 P.3d 117(2001)

Defendants have made no claim that there was any bad faith, fraud, duress or undue influence involved insofar as their entering into the settlement agreement. There are, it is submitted, no other defenses that can be raised to the settlement

agreement.

2. In an action brought to enforce an agreement of compromise and settlement, made in good faith, the court will not inquire into the merits or validity of the original claim. *Goodman v. Lothrop*, 143 Idaho 622, 151 P.3d 818(2007)

As set forth in *Goodman* any defenses or claims defendants may have had to plaintiff's original causes of action, are not available as defenses to enforcement of the settlement agreement. As a result of the settlement agreement defendants' efforts to resurrect a defense they raised to plaintiff's original claim is inappropriate and without merit.

It is submitted that all of the arguments raised by defendants are smoke screens. There is no substance to any of the four arguments raised and the arguments made seem to be nothing more than weak efforts to avoid paying the money owed.

V. CARY HAMILTON WAS PROPERLY DROPPED AS A PLAINTIFF

The judge, at the tail end of the proceedings in the lower court, entered an order that directed that Cary Hamilton be added back in as a plaintiff in this case.(R.p.147)

After the settlement agreement fell apart the court advised plaintiff that if plaintiff wanted to go forward with a cause of action, based on the settlement agreement, that the pleadings needed to be amended. A Second Amended Complaint was filed and,

at the time of the filing, plaintiffs' counsel opted to drop Cary Hamilton as a plaintiff.

A motion had been filed to do this previously but no hearing was ever held. At the time the original complaint was filed Cary Hamilton was named as a plaintiff because the check that was written, the check that defendants later stopped payment on, was made payable to C&J Construction which was Cary Hamilton's dba. Defendants contested the check cause of action because the statute of limitations had expired at the time the complaint was filed. Plaintiffs then voluntarily dropped the check cause of action. After the cause of action was dropped Cary Hamilton had no further interest in the action and, consequently, should have been dismissed as a party to the action. Plaintiffs filed their Second Amended Complaint on April 5, 2010. Defendants filed an answer. No objection was made to the dropping of Cary Hamilton as a plaintiff until a year after the Second Amended Complaint was filed.

The court ordered that plaintiff could file a Second Amended Complaint. It was filed and Cary Hamilton was not listed as a plaintiff. Defendants should have had some obligation, if they saw fit, to note any objection they may have had to Cary Hamilton being dropped as a plaintiff when they filed their answer. Even using the time limits in Rule 60(b) suggests that after 6 months

defendants have waived any objection they might have had to the dropping of Cary Hamilton as a plaintiff. For these reasons it is suggested that the trial court erred in entering the order requiring that Cary Hamilton be included as a plaintiff.

VI. PLAINTIFF SHOULD HAVE BEEN AWARDED ATTORNEY FEES

Plaintiff requested attorney fees in the trial court. Defendants objected but their objection was limited to an objection that the fees were excessive. (R.p.92) Costs were awarded but the request for fees was denied.(R. p.124) Plaintiff appealed from the court's ruling on this issue. Plaintiff submits that attorney fees should have been awarded for a portion of the legal fees plaintiff incurred.

Plaintiff submitted, as part of the Memorandum of Costs and the supporting Affidavit, a full history of the legal work that was involved with the case. The fees can be addressed in their totality but they also can be divided and plaintiff submits that the fees should be addressed under two separate classifications. The first classification is the legal fees plaintiff incurred prior to the date of the settlement agreement. The second is the fees that were incurred following the time the parties entered into the settlement agreement on 9/9/09.

Plaintiff's counsel devoted, as of the time the amended costs and fee bill was submitted to the court, a total of 108.33

hours. (R.pp.112-119) Of this total plaintiff's counsel devoted 66.03 hours prior to the settlement of 9/9/09 and 42.3 hours were devoted to the case following the time the parties entered into the settlement agreement. Plaintiff's hourly rate was $200 per hour which breaks down as follows: presettlement: $13,206.00, post settlement: $8,460.00.

There is no question that plaintiff was the prevailing party in this case. Plaintiff requested fees under I.C. 12-120 and under I.C. 12-121. (R. pp.112-113)

Plaintiff submits that fees should have been awarded for the total amount of time involved in going forward with the case. However, at a minimum the trial court should have awarded plaintiff the fees incurred to enforce the settlement agreement.

Plaintiff suggests that there are two reasons why post settlement fees should be awarded. The first is under I.C. 12-120 and the second is under I.C. 12-121.

VII. FEES SHOULD BE AWARDED BASED ON I.C. 12-120

When the parties entered into the settlement agreement the case was basically resolved from the Knowltons' standpoint because, after the agreement was entered into, the Knowltons really didn't have to do anything but sign the application that was to be submitted to the County to have the amended subdivision approved. Plaintiff was responsibile to pay the costs and to

take the action necessary to get the subdivision approved. Defendants' only other obligation was to pay plaintiff, after plaintiff finished the subdivision process, the sum of $23,421.01.

After defendants, without justification, sent the letter to the County withdrawing the subdivision application the plaintiff was entitled to receive, as damages, the sum of $23,421.01 from defendants. Plaintiffs, after the settlement agreement was reached and then breached, sent two separate letters to defendants requesting that defendants either withdraw their opposition to the subdivision process or requesting the payment of the $23,421.01. (See Stoker Affidavit #3) The first of these letters was sent on February 23, 2010 and the second was sent on March 5, 2010. Plaintiff filed the Second Amended Complaint, adding the cause of action based on the settlement agreement, on April 5, 2010.

I.C. 12-120 normally applies to a situation where a complaint is filed after a 10 day written demand for payment. However, it is submitted that in this situation the Second Amended Complaint became the complaint for damages based on the settlement agreement. The demand letter was sent on February 23rd and the suit was filed more than 10 days after the demand letter was sent. Plaintiff submits that the provisions of I.C.

12-120 are applicable, as to the settlement agreement, and attorney fees should have been awarded by the trial court, if not for the full amount of legal fees, then, at a minimum, for legal fees incurred after 9/9/10.

VIII. ATTORNEY FEES SHOULD BE AWARDED BASED ON I.C. 12-121.

Attorney fees, under I.C. 12-121, may be awarded if the defenses raised are frivolous, unreasonable or without foundation. See, *e.g., Jerry J. Joseph v. Vaught*, 117 Idaho 555, 789 P.2d 1146(App.1990)

Attorney fees should be awarded when there is no legitimate, triable issue of fact and where a party asserts legal or factual issues which have no support in the law or the facts. See, *e.g., Turner v. Willis*, 119 Idaho 1023, 812 P.2d 737(1991)

The award of attorney fees, under I.C. 12-121, is a matter of discretion and it is necessary that the court determine that there was an abuse of discretion before the court will overrule the trial court's exercise of discretion. See, *e.g., Treasure Valley Concrete, Inc. v. State*, 132 Idaho 673, 978 P.2d 233(1999)

The trial court did deny attorney fees under I.C. 12-121 but only makes the following statement as to said denial:

> The court does not find that the defendant's defense was brought or pursued frivolously, unreasonably, or without foundation. Therefore, the plaintiff is not entitled to an award of attorney fees pursuant to Idaho Code Section 12-121.(R.p.128)

The test, to determine if a trial court abused it's discretion in failing to award fees, is a three-factor test. The three steps are set forth in *Burns v. Baldwin*, 138 Idaho 480, 486, 65 P.3d 502(2003), as follows:

> To determine whether the award of attorney fees was an abuse of discretion this Court applies the three-factor test from Sun Valley Shopping Center: '() whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000(1991)'

The trial court properly determined that awarding fees under 12-121 was a matter of discretion. However, it is submitted that the trial court's decision does not meet the other two aspects of the "three-factor test".

It should be noted that plaintiff only sought fees, under 12-121, for the attorney fees that were required to enforce the settlement agreement. (R.p.113) The trial court, in its decision, does not tell us whether or not the court was looking at the totality of the case, which would include the defenses raised to the original causes of action, when the court made the determination that "defendant's defense" was not frivolous, etc. Consequently, it is impossible to tell whether or not the court did, or did not, decide that defendants' four arguments raised to the cause of action to enforce the settlement agreement were

frivolous or not.

The next problem with the court's decision is that the court states that it did not find that the "defendants defense", in the singular, was raised frivolously, etc. It is impossible to know which of the so-called defenses defendants presented is the one the court determined was legitimate.

The third problem lies with whether or not the "trial court reached its decision by an exercise of reason." Plaintiff submits that it did not.

Although set forth previously, defendants have never argued that they did not breach the agreement by failing to cooperate. There only arguments have been that they were justified in withdrawing the application that had been submitted to the County, and thereby breaching their obligation to "cooperate", because of the following reasons: 1) the easement argument; 2) the notice issue; 3) the good faith and fair dealing argument; and 4) the public policy argument based on defendants' argument that the original sale agreement was void because of the Minidoka subdivision argument.

As hereinbefore discussed there is, and was, absolutely no justification for the four arguments defendants have made. This becomes even more evident in light of the two letters sent to defense counsel wherein plaintiff endeavored to convince

defendants that plaintiff was willing to work out any problems that existed with the application. If defendants had met, as requested, with plaintiff then the easement issue could have been addressed. It really didn't matter to plaintiff where the easements were placed. Plaintiff had nothing to gain, or lose, by the location of the easements and so there was no reason why plaintiff would not have been willing to make those changes. As to the notice problem, it would not have been any major problem to just re-notice the P&Z meeting which would have allowed defendants to attend the P&Z meeting.

As previously set forth the argument about the covenant of good faith and fair dealing is nothing more than the easement and notice arguments wrapped up in a different package. It is submitted that neither the case law, or the facts involved, give any justification to the defendants' covenant of good faith argument.

Finally, there is no basis in case law, or in the undisputed facts of this case, that justify raising the argument that the court is, by enforcing the settlement agreement, enforcing a contract that is void and against public policy.

Because defendants had absolutely no justifiable defense to the enforcement of the settlement agreement there was no basis for the court to make any determination other than a

determination that the defendants' four defenses were frivolous, etc.

IX. ATTORNEY FEES SHOULD BE AWARDED TO PLAINTIFF FOR THE APPELLATE WORK

Plaintiff seeks attorney fees on appeal under I.C. 12-120(1), based on I.C. 12-121/123 and based on Rules 11 and 54. Plaintiff incorporates, as part of this request, the discussions hereinbefore set forth in this brief concerning why the trial court should have awarded fees.

Under 12-120, the amount plead in the Second Amended Complaint was under $25,000.00(R.p.53-55), a demand letter was sent more than 10 days before the filing of the Second Amended Complaint (Stoker Affidavit #3) and the amount awarded was less than $25,000.00(R.p.89). Consequently, fees should be awarded for the appeal.

In regard to the award of fees based on I.C. 12-121, the following principles appear to be applicable:

1. If all an appeal does is invite the appellate court to second guess the trial court then fees should be awarded. *DeChambeau v. Estate of Smith*, 132 Idaho 568, 976 P.2d 922(1999); *Crowley v. Critchfield*, 145 Idaho 509, 1891 P.3d 435(2007)

There is nothing in defendants' brief that does any more than ask the appellate court to "second guess" the trial court.

2. If a party's appellate arguments totally lack foundation

then an award of fees is appropriate. *Karson v. Harris*, 140 Idaho 561, 97 P.3d 428(2004)

Defendants, in their brief, provide no reason why the easement and notice issues could not have been addressed, and dealt with, if the defendants had withdrawn their opposition to the county entertaining the subdivision application. In fact, the information available to the trial court established that the easement issue was no issue at all, the notice issue could have been dealt with by re-noticing the P&Z hearing and the public policy statutory argument never was supported by any law or facts, especially in regard to the settlement agreement on which the summary judgment was based.

3. Both an attorney and his client can be held responsible for attorney fees when there is no good faith basis for an appeal. *MacLeod v. Reed*, 126 Idaho 669, 889 P.2d 103 (App.1995)

The attorney has the duty to determine that there is a legitimate basis for an appeal before he ever files it and both the attorney, and the defendants, in this matter knew, or should have known, that the appeal was brought in bad faith and that the four arguments raised were not meritorious.

4. If the position advocated by a party is "plainly fallacious and, therefore not fairly debatable" then fees should be awarded. *Associates NW, Inc. v. Beets*, 112 Idaho 603, 605, 733

P.2d 824(1987)

It is submitted that the facts in this case, and the applicable legal principles, overwhelmingly suggest that the present appeal is without foundation and the trial court's ruling granting the summary judgment is not "fairly debatable".

CONCLUSION

For the reasons set forth in this brief the court should uphold the trial court's granting of summary judgment on the settlement agreement, should award fees and costs on appeal and should remand this matter to the trial court to complete the foreclosure process if the monies owed are not paid.

Respectfully submitted this 26 day of September, 2011.

JEFF STOKER

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of September, 2011, I had two copies of the foregoing served by depositing true copies thereof in the method indicated below, and addressed to the following:

Kent D. Jensen
P.O. Box 276
Burley, ID 83318

_____ U.S. Mail, Postage Prepaid
_____ Hand Delivered
_____ Overnight Mail
_____ Fax

_____
JEFF STOKER